Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Jurisdictional Separations and Referral to the Federal-State Joint Board	)	CC Docket No. 80-286
	)	

COMMENTS OF THE
COALITION FOR EQUITY IN SWITCHING SUPPORT

The Coalition for Equity in Switching Support[1] ("Coalition" or "Equity Coalition") hereby submits to the Federal Communications Commission ("FCC" or "Commission") its comments in the above-captioned proceeding.[2]

The NPRM proposes to extend the separations freeze for one year until June 30, 2010 while the Commission considers more comprehensive separations reform.[3] It also asks commenters "to consider how costly and burdensome an extension of the freeze . . . would be for small incumbent LECs, and whether an extension would disproportionately affect specific types of carriers or ratepayers."[4]

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1 The Coalition's members currently include Bixby Telephone Company; Chequamegon Communications Cooperative, Inc.; Cross Telephone Company; Farmers Telephone Cooperative, Inc.; Granite State Telephone, Inc.; Hargray Telephone Company, Inc.; Ketchikan Public Utilities; Northeast Florida Telephone Company; Randolph Telephone Membership Corporation; Roanoke and Botetourt Telephone Company; Star Telephone Membership Corporation; Telephone Service Company of Ohio; Vermont Telephone Company, Inc.; Waitsfield and Champlain Valley Telecom; and Warwick Valley Telephone Company.

2 *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 09-24 (rel. March 27, 2009) ("Notice" or "NPRM").

3 *Id.* ¶ 17.

4 *Id.*

The Coalition does not oppose an extension of the freeze of cost allocation factors, but believes that the rules excepting the Dial Equipment Minute ("DEM") weighting factors for Local Switching Support ("LSS") from the separations freeze should state clearly that, during the separations freeze period, DEM weighting factors will be determined on the basis of an eligible carrier's actual line count for the applicable reporting period, and not on an historic line count that no longer represents the carrier's true size and scale. To date, the existing DEM weighting factor rules have been implemented on the basis of historic, instead of current, access line counts. This interpretation of the rule has served to deny the Coalition members much needed LSS solely because they briefly exceeded one of the access line thresholds in the rule – even though their line count subsequently fell back below the threshold and even though similarly-sized and larger carriers receive support based on higher DEM weighting factors. Section 36.125(j) of the Commission's rules, as proposed in Appendix A to the NPRM, would extend until June 30, 2010, the inequitable practice reflected in the current rule, which has been interpreted to deny carriers the use of higher DEM weighting factors even when their access lines decrease below a threshold number. The revision proposed by the Coalition would correct this unintended inequity.

The Coalition filed a Petition for Clarification in January explaining in greater detail the need for two-way DEM weighting factor adjustments. The Coalition will not restate here all of the points made in that Petition, but attaches it hereto for inclusion in the record of this proceeding.[5]

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[5] *See Jurisdictional Separations and Referral to the Federal-State Joint Board; Federal-State Joint Board on Universal Service*, CC Docket Nos. 80-286 and 96-45, Petition for Clarification of Coalition for Equity in Switching Support (Jan. 8, 2009)

LSS support is calculated by applying a DEM weighting factor to a carrier's local switching costs. The factor is determined on the basis of whether an eligible carrier's access lines are less than 10,000, between 10,001 and 20,000, or between 20,001 and 50,000. Incumbent local exchange carriers ("LECs") with more than 50,000 access lines in a study area do not receive LSS assistance. A lower number of access lines typically translates into a higher DEM weighting factor, meaning that a larger percentage of the carrier's costs would be recovered from the interstate jurisdiction through a higher level of federal local switching support. Thus, an eligible carrier with fewer than 10,000 access lines is assigned a DEM weighting factor of 3, whereas a carrier with between 20,001 and 50,000 access lines is assigned a factor of 2.

In the original *2001 Separations Order*, the Commission froze all factors used to allocate costs between the interstate and intrastate jurisdictions for a period of five years.[6] The Commission, however, made one exception – it provided that the DEM weighting factor used in calculating a carrier's LSS would be reduced if a carrier's access line count exceeded one of the three thresholds.[7]

At the time the rule originally was adopted, carriers' access lines had increased steadily for decades. Given the historic trend of ongoing growth in access lines, the

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("Petition"); *see also High-Cost Universal Service Support*, WC Docket No. 05-337, Public Notice, "Comment Sought on the Petition of the Coalition for Equity in Switching Support for Clarification of Sections 36.125 and 54.301 of the Commission's Rules Concerning Local Switching Universal Service Support," DA 09-634 (rel. March 19, 2009). In that Petition, the Coalition also explained why the revised DEM weighting rule the Commission adopted in the *2001 Separations Order* expired on June 30, 2006 and, consequently, has not been in effect since that date. *See infra* note 9.

6 *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, ¶ 2 (2001) ("*2001 Separations Order*").

7 *See* 47 C.F.R. § 36.125(j).

Commission did not want to freeze DEM weighting factors and, thereby, provide higher levels of switching support for companies whose access lines exceeded the applicable maximum during the period the freeze was in effect. The Commission acted to ensure that, notwithstanding the general freeze in jurisdictional cost allocations, LSS assistance would be based on a carrier's current line count – not a pre-freeze historic line count – so as not to provide a windfall to carriers with increasing access lines.

The Commission explicitly addressed only the contingency of an increase in a carrier's access line count during the freeze because it apparently (and not unreasonably) did not contemplate that a carrier's line count might decrease – or increase and then decrease – during that period.[8] The pattern of steadily increasing incumbent LEC access lines has changed, however, since this exception to the separations freeze was adopted in 2001. Incumbent LECs, both large and small, have experienced reductions in access lines due to many factors that have had varying degrees of impact on the affected companies. In light of these developments, the Commission should make clear in the DEM weighting rules applicable to any extension of the freeze that LSS assistance will be based on an eligible carrier's actual line count during an applicable period, not on its line count during an earlier period.

The same compelling equitable public policy considerations that underlie a requirement that LSS assistance be adjusted during the freeze to account for increases in access lines that exceed one of the thresholds also justify a requirement that such assistance take into account reductions in access lines below one of the thresholds. The

[8] Similarly, Section 54.301(a)(2)(ii) – which was adopted in 1997 – also only addressed the contingency of the effect on LSS of an increase in access lines because in 1997 the industry had experienced only increases in access lines. *See* 47 C.F.R. § 54.301(a)(2)(ii).

Commission's DEM weighting rules should neither permit a windfall for carriers that experience line growth during the freeze nor penalize companies that lose access lines. Simply put, the Commission should make clear that the exception to the overall separations freeze permits both upward and downward adjustments to the DEM weighting factor so that a carrier receives only support to which it is entitled based on current access line counts.[9]

[9] The Commission also should take this opportunity to clarify that the original DEM weighting exception to the separations freeze applied only to the period that ended on June 30, 2006, since the Commission did not change the expiration date in Section 36.125(j) from that date when, in 2006, it extended the separations freeze until June 30, 2009. Accordingly, the Commission should clarify that incumbent LECs whose line counts fell below an applicable threshold before June 2009 are entitled to LSS assistance from July 1, 2006 until June 30, 2009 based on DEM weighting factors reflective of their actual line counts for those periods.

For the foregoing reasons, if the FCC extends the separations freeze, it should make clear that small incumbent LECs are entitled to receive support for local switching costs through LSS based upon their current number of access lines for the reporting period, not their access line counts during a prior period. This approach would not affect the freeze of other separations factors nor would it establish precedent or otherwise bind the Commission in its implementation of comprehensive separations and universal service reform.

Respectfully submitted,

COALITION FOR EQUITY IN SWITCHING SUPPORT
Bixby Telephone Company
Chequamegon Communications Cooperative, Inc.
Cross Telephone Company
Farmers Telephone Cooperative, Inc.
Granite State Telephone, Inc.
Hargray Telephone Company, Inc.
Ketchikan Public Utilities
Northeast Florida Telephone Company
Randolph Telephone Membership Corporation
Roanoke and Botetourt Telephone Company
Star Telephone Membership Corporation
Telephone Service Company of Ohio
Vermont Telephone Company, Inc.
Waitsfield and Champlain Valley Telecom
Warwick Valley Telephone Company

John E. Logan
Counsel to the
Coalition for Equity in Switching Support
1050 Connecticut Ave. NW, Tenth Floor
Washington, DC 20036
(202) 772-1981

Dated: April 17, 2009

Certificate of Service

I hereby certify that on this 17th day of April, 2009, I caused true and correct copies of the foregoing Comments of the Coalition for Equity in Switching Support to be mailed by electronic mail to:

Best Copy and Printing, Inc.
445 12th Street SW, Room CY-B402
Washington, DC 20554
fcc@bcpiweb.com

and

Antoinette Stevens
Telecommunications Access Policy Division
Wireline Competition Bureau
445 12th Street SW, Room 5-B521
Washington, DC 20554
antoinette.stevens@fcc.gov

John E. Logan

Attachment to the Comments of the Coalition for Equity in Switching Support

CC Docket No. 80-286

April 17, 2009

Before the
Federal Communications Commission
Washington, DC 20554

Jurisdictional Separations and Referral to the Federal-State Joint Board	)))	CC Docket No. 80-286
Federal-State Joint Board on Universal Service	))	CC Docket No. 96-45 WC Docket 05-337

PETITION FOR CLARIFICATION

COALITION FOR EQUITY IN SWITCHING SUPPORT

Cross Telephone Company
Hargray Telephone Company, Inc.
Hart Telephone Company
Ketchikan Public Utilities
Northeast Florida Telephone Company
Randolph Telephone Membership Corporation
Star Telephone Membership Corporation

c/o David H. Armistead
Vice President and General Counsel
Hargray Telephone Company, Inc.
856 William Hilton Parkway, Building C
P.O. Box 5986
Hilton Head, SC 29938
(843) 686-1275

January 8, 2009

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Washington, DC 20554

Jurisdictional Separations and Referral to the Federal-State Joint Board	)))	CC Docket No. 80-286
Federal-State Joint Board on Universal Service	))	CC Docket No. 96-45

PETITION FOR CLARIFICATION

Cross Telephone Company, Hargray Telephone Company, Hart Telephone Company, Ketchikan Public Utilities, Northeast Florida Telephone Company d/b/a NEFCOM, Randolph Telephone Membership Corporation, and Star Telephone Membership Corporation (collectively, "Coalition for Equity in Switching Support," "Equity Coalition," or "Petitioners") hereby submit this Petition[1] seeking clarification from the Federal Communications Commission ("Commission" or "FCC") that sections 36.125 and 54.301 of the FCC's rules provide that the amount of local switching support for which a carrier is eligible depends on the number of lines the carrier currently serves, regardless of whether the carrier had a greater number of lines at some point in the past.[2]

I. INTRODUCTION AND SUMMARY

The FCC has long recognized that small rural incumbent local exchange carriers confront higher per-subscriber switching costs than their larger local exchange carrier counterparts because they lack the number of subscribers or the concentrated subscriber

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[1] *Jurisdictional Separations and Referral to the Federal-State Joint Board; Federal-State Joint Board on Universal Service*, Petition for Clarification, CC Docket Nos. 80-286 and 96-45 (filed January 8, 2009) ("Petition").

[2] *See* 47 C.F.R. §§ 36.125(j), 54.301(a)(2)(ii).

population that would enable them to take advantage of scale and scope economies. When it implemented the universal service mandate of the Telecommunications Act of 1996 (the "1996 Act"), the Commission established an explicit support mechanism, called Local Switching Support ("LSS"), designed to partially offset those higher costs and ensure that small rural carriers could make necessary upgrades to their equipment, as needed, and provide quality service to their rural customers. The FCC has acknowledged the absence of LSS could produce a hardship for customers in areas served by small rural LECs.[3] Indeed, the Commission has noted that without LSS a small carrier may not have the capacity to provide and maintain quality service at just, reasonable, and affordable rates.[4]

Unfortunately, the Commission's rules promulgated to implement LSS contain an ambiguity that could be read, and has been applied, to deny many small rural carriers, including the Coalition for Equity in Switching Support, access to critical switching cost support because their access lines at one time might have exceeded a threshold number embedded in the Commission's LSS rules, even if the carriers' access lines subsequently decreased back below the threshold. Each of the members of the Equity Coalition is in this perplexing and inequitable position, and therefore is faced with a denial of much needed LSS even while similarly situated carriers with the same number of access lines continue to receive it.

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3 *See, e.g., Federal-State Joint Board on Universal Service; Dixon Telephone Company; Lexcom Telephone Company; Citizens Telephone Company of Higginsville, Missouri; Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date*, Order, 21 FCC Rcd 1717, ¶ 8 (WCB 2006).

4 *See Federal-State Joint Board on Universal Service; Smithville Telephone Company, Inc., Petition for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date for an Average Schedule Company*, Order, 19 FCC Rcd 8891, ¶ 6 (WCB 2004).

Such a reading of the ambiguous rule is in no way compelled by the statute or supported by any rationale in the Commission's orders. In fact, it would be directly contrary to the stated objective for LSS as expressed by the FCC and the universal service objectives contained in the Communications Act of 1934, as amended ("the Act"). Therefore, to prevent further imposition of hardship on small rural local exchange carriers, the Equity Coalition implores the Commission to act promptly to clarify the ambiguous rule in a manner that will uphold the principles contained in section 254 of the Act[5] and expressed by the FCC, and eliminate the inequities in LSS between similarly situated companies. The Equity Coalition maintains that the best reading of the rule that would accomplish those objectives is one that concludes that, after June 30, 2006, the weighting factor used to determine the appropriate level of LSS depends on the carrier's current number of access lines, regardless of whether the carrier's lines may have exceeded a threshold in the past.[6]

II. DESCRIPTION OF PETITIONERS

The Equity Coalition is comprised of local exchange carriers with line counts that in the past may have exceeded the threshold numbers (50,000, 20,000, and 10,000) in the

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5 47 U.S.C. § 254.

6 An estimate of the amount of annual LSS at issue, not just for the petitioners but for all telecommunications carriers that might qualify should the Commission clarify the rule as requested in this petition, approximates $11.7 million. This amount is less than 0.2% of the $6.95 billion fund and granting the request for clarification would not have a perceptible impact on the overall Universal Service Fund. However, on a company-specific basis, the additional support can make a tremendous difference in its ability to deliver high quality affordable services to any requesting customer.

Commission's rules regarding LSS, but now have line counts below the specific thresholds at issue for each Dial Equipment Minutes ("DEM") weighting tier.[7]

Hart Telephone Company ("Hart") is a small local telephone company that has served Hartwell, Georgia and most of Hart County since 1904. Hart has approximately 8,100 access lines and crossed over 10,000 in 2001, never reported more than 10,565 lines and crossed back under the threshold in 2005. Presently, Hart is receiving LSS using a 2.5 DEM factor. Hart lost 25% of its LSS as a result of temporarily exceeding the 10,000 line threshold, while several companies with higher access line counts receive LSS based on the maximum 3.0 times DEM weighting.

KPU Telecommunications is part of Ketchikan Public Utilities, a municipally-owned telecommunications, electric, and water utility, which offers services in Ketchikan, Alaska, and the Ketchikan Gateway Borough. The City of Ketchikan has operated this utility since 1934, with the elected City Council directing the utility. Ketchikan is an isolated community on Revillagigedo Island, which is accessible only by boat or airplane. Ketchikan Public Utilities first exceeded the 10,000 access line threshold in 1996. Prior to 1996 KPU had a 3.0 weighting factor. Subsequent economic events highlighted by the loss of the largest employer, Ketchikan Pulp Company, and other industry, economic and competitive factors caused the KPU access line count to drop below 10,000 lines in 2004. KPU currently has 7,600 lines, but is receiving LSS using a 2.5 DEM factor. KPU lost 25% of its LSS because it briefly exceeded 10,000

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7 *See* 47 C.F.R. § 36.125(f) (establishing the tiered weighting mechanism); *see also id.* § 36.125(a)(3) (defining "Dial equipment minutes of use (DEM)" as "the minutes of holding time of the originating and terminating local switching equipment.").

lines even though it has an access line count 2,400 below the 10,000 threshold and below several other carriers who receive full support.

Northeast Florida Telephone Company d/b/a NEFCOM is a local telephone company operating in Baker County in Northeast Florida with its primary office located in Macclenny, Florida. NEFCOM crossed over the 10,000 line threshold in 2001 by 529 lines and remained less than 300 lines over 10,000 until 2008, when it fell back below the threshold. Today, it provides basic local exchange telecommunications services to approximately 9,100 access lines in an area approximately 30 miles west of Jacksonville, Florida, and receives LSS using a 2.5 DEM factor.

Randolph Telephone Membership Corporation (RTMC or Randolph) offers service in the Badin Lake, Bennett, Coleridge, Farmer, Jackson Creek, High Falls and Pisgah exchanges, which are located primarily in Randolph, Moore and Montgomery counties in central North Carolina. RTMC crossed the 10,000 line threshold in 1999 and went below the threshold in March 2006. As of October 1, 2008, RTMC served less than 9,600 access lines but receives LSS using a 2.5 DEM factor.

Star Telephone Membership Corporation (STMC or Star) has been providing local phone service to rural North Carolina since the early 1950s in the less populated regions of Bladen, Sampson, Duplin and Columbus Counties. To meet the needs of these unserved areas, concerned citizens went door-to-door to get enough subscribers to form the Lower Cape Fear and Cumberland-Sampson Telephone Membership cooperatives. In 1959, the two groups merged to become Star Telephone Membership Corporation, which provides local, long distance, and broadband Internet access to a 1,458-square mile operating area. STMC crossed the 20,000 line threshold for only one year, 2003; fell below the next year; and serves just over 17,000 access lines today, yet Star receives LSS using a 2.0 DEM factor. Thus, Star has lost 33% of its LSS as a result of one year in which it exceeded 20,000 lines.

Cross Telephone Company was founded in 1911 and serves eleven exchanges in rural Eastern Oklahoma. Despite having access lines under the 10,000 threshold for more than 90 years of its almost 100 year history, Cross's brief increase in access lines over that threshold from 2001 – 2005 has resulted in it receiving substantially less LSS than similarly sized companies. As of December 31, 2007, Cross had approximately 9,700 access lines in service. Presently, Cross Telephone is receiving LSS with a 2.5 DEM factor, while Ponderosa Telephone Co., with over 9,800 access lines reported for the same period, receives LSS based on a 3.0 times DEM factor.

Hargray Telephone Company ("Hargray") has been providing local telephone service in southeastern South Carolina for more than 60 years. Hargray collected LSS until 2000, when it reported to the Universal Service Administrative Company ("USAC") that its number of lines exceeded 50,000. As of 2008, however, the number of access lines served by Hargray has declined to approximately 45,000, and yet Hargray is not receiving any LSS despite reporting access lines which until 2001 would have qualified them for 2.0 times DEM weight support.

The attached chart illustrates that local telephone companies with roughly the same number of access lines have different DEM weighting factors, with inequitable results.[8] For example, as of December 31, 2007, Windstream SW New Mexico #2 had

[8] The chart attached as Exhibit 1 shows selected companies with access line counts within the same DEM categories, *i.e.*, 0 – 9,999; 10,000 – 19,999; or 20,000 – 49,999. The chart is not exhaustive, but simply illustrates the fact that companies with similar

roughly 47,000 access lines and Windstream SW New Mexico #1 had 43,000 access lines. Both companies, which have roughly the same number of access lines as Hargray, receive LSS based upon a 2.0 DEM weighting factor, while Hargray received no LSS. The Ponderosa Telephone Company has approximately 9,854 access lines and receives LSS based upon a 3.0 DEM weighting factor. KPU Telecommunications, Cross, and Hart have fewer access lines than Ponderosa (9,542; 9,723; and 9,410, respectively) yet receive LSS based on a lower DEM weighting factor (2.5) than is used for Ponderosa.

The application of the one-way rule to Panhandle Telephone Cooperative (Panhandle) and Butler Telephone Company (Butler) further illustrates its inequity. Panhandle would lose 33% of its LSS and have the same DEM factor, 2.0, as Windstream SW New Mexico #2, even though it has 30,000 fewer access lines. A dozen companies who reported higher access line counts than Panhandle in the same USAC filing receive LSS based on 2.5 weighting. Butler would receive 25% lower LSS based on 2.5 times DEM weighting, while 25 companies with higher current access line counts receive DEM support using the higher 3.0 times DEM factor. In no way is such disparate and inequitable treatment in the public interest or in furtherance of any stated Commission goal.

III. INTENT OF THE RULES AND EQUITABLE TREATMENT OF SMALL RURAL LOCAL EXCHANGE CARRIERS

The Commission should clarify that its rules permit small incumbent LECs to receive support for local switching costs based upon their current number of access lines, regardless of whether a carrier's access lines exceeded a threshold number in the past.

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numbers of access lines have different DEM weighting factors. The companies whose names are bolded exceeded a DEM threshold and then fell back beneath that threshold.

There is no evidence in the public record to suggest that Congress or the Commission intended to permanently deny adequate local switching support to small local exchange carriers whose number of access lines may have temporarily exceeded a threshold. Congress instructed the Commission to ensure the adequacy of universal service support and to make implicit subsidies explicit. No party participating in the Commission's separations rulemaking specifically recommended that local switching support levels for small rural carriers be permanently reduced, even if lines subsequently dipped below the threshold, nor are there any statements by the Commission indicating that it intended to apply such treatment. Absent a record and express language in an order indicating the Commission's intent to permanently end or reduce local switching support if a carrier temporarily went above specific threshold levels, we believe that clarification of the meaning of section 36.125(j) at the earliest possible date would be consistent with legislative and regulatory intent.

History

The Commission historically has taken steps to ensure that small rural LECs are able to continue to provide their customers with quality local telephone services at reasonable rates. The mechanism for providing support has changed over time, but the overarching principle of ensuring adequate support has remained constant.

DEM Weighting. Prior to 1998, the Commission allowed small rural telephone companies to allocate a greater portion of their local switching costs to the interstate jurisdiction and to recover those costs through interstate switched access charges. The Commission determined that these smaller telephone companies could not take advantage of certain economies of scale and therefore had higher local switching costs than their larger counterparts.[9] By allocating more of their switching costs to the interstate jurisdiction, small companies were able to recover those higher costs through interstate switched access charges, rather than through intrastate rates. The proportion of switching costs recoverable through interstate switched access charges was determined through the DEM weighting mechanism. The DEM factor is the ratio of interstate DEM to total DEM. For small rural telephone companies, the weighting mechanism multiplied the measured DEM by a factor of up to 3, depending upon the number of access lines in the company's study area, thereby increasing the portion of switching costs allocated to the interstate jurisdiction.

The original DEM weighting rule, codified in section 36.125 of the Commission's rules, permitted small incumbent LECs to increase or decrease their DEM factors annually in accordance with their actual number of access lines, without regard to whether that company's access line count had surpassed any of the thresholds in the past.

Explicit Subsidy. The 1996 Act, *inter alia*, added a new section 254 to the Communications Act of 1934, requiring the Commission to make explicit universal service support that previously had been implicit, such as the recovery of higher switching costs through interstate switched access charges via the DEM weighting mechanism described above.[10] Section 254 also requires that universal service support

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9 *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 212 (1997) ("*1997 USF R&O*"). The Commission took note of the Joint Board's observation that "rural carriers generally serve fewer subscribers relative to the large incumbent LECs, serve more sparsely populated areas, and do not generally benefit from economies of scale and scope as much as non-rural carriers." *Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87, ¶ 283 (1996); *1997 USF R&O* ¶ 291.

10 47 U.S.C. § 254(e) (requiring universal service support to be "explicit and sufficient to achieve the purposes of this section").

mechanisms be "specific, predictable, and sufficient,"[11] and that consumers in rural and high cost areas have access to telecommunications services reasonably comparable to those available in urban areas and at rates that are reasonably comparable to rates charged in urban areas.[12]

Intent. Section 254 included a mandate to replace implicit support like DEM weighting with explicit support, but it did not direct the Commission to make further changes to the program and, as mentioned above, it required that support be sufficient. To fulfill this mandate, the Commission, in 1997, adopted a rule replacing implicit support formerly recovered through interstate switched access charges with explicit federal universal service support.[13] The order froze the interstate allocation of local switching costs at 1996 levels in Part 36, but wrote Part 54 in such a way that if the number of a carrier's lines were to grow such that the DEM weighting factor would be reduced, the carrier would be required to apply the lower weighting factor to the 1996 unweighted interstate DEM factor to calculate its universal service support.[14] The Commission reasoned that its approach would provide support for rural carriers "to make prudent upgrades to their switching equipment needed to maintain, if not improve, the quality of service to their customers."[15] That rule was codified in section 54.301(a) of the Commission's rules and reads, in relevant part, as follows:

> (1) Beginning January 1, 1998, an incumbent local exchange carrier that has been designated an eligible

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11 47 U.S.C. § 254(b)(5).

12 47 U.S.C. § 254(b)(3).

13 *1997 USF R&O* ¶ 303.

14 *Id.* ¶ 304.

15 *Id.*

> telecommunications carrier and that serves a study area with 50,000 or fewer access lines shall receive support for local switching costs using the following formula: the carrier's projected annual unseparated local switching revenue requirement, calculated pursuant to paragraph (d) of this section, shall be multiplied by the local switching support factor. . . .
>
> (2) . . . (i) The local switching support factor shall be defined as the difference between the 1996 weighted interstate DEM factor, calculated pursuant to § 36.125(f) of this chapter, and the 1996 unweighted interstate DEM factor.
>
> (ii) If the number of a study area's access lines increases such that, under § 36.125(f) of this chapter, the weighted interstate DEM factor for 1997 or any successive year would be reduced, that lower weighted interstate DEM factor shall be applied to the carrier's 1996 unweighted interstate DEM factor to derive a new local switching support factor.[16]

Ambiguity. The rule is silent on LSS in the event that the number of a carrier's access lines *decreased* rather than *increased*, or increased over a threshold and then decreased again below that threshold.[17] The order adopting the rule likewise contained no suggestion that a carrier would be ineligible for a higher weighted interstate DEM factor if its number of access lines decreased below a threshold; there simply was no discussion of carrier eligibility for support if access lines were to decrease. Indeed, when the *Report and Order* was issued, local exchange carriers' access lines had risen virtually without exception for over half a century. The industry as a whole did not experience its

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[16] 47 C.F.R. § 54.301(a)(1)-(2).

[17] When section 54.301 was first promulgated in 1997, section 36.125 (to which section 54.301 refers) required small rural LECs surpassing a threshold number of access lines to lower their DEM weighting factors but did not specify that the LECs would be required to maintain those lower weighting factors for the duration of a "freeze period."

first reduction in access lines in recent times until the end of 2001.[18] In light of the historic trend, the implicit assumption in 1997 that LECs would continue to experience an increase in their number of lines was not surprising.

In May 2001, the Commission adopted a five-year interim freeze of separations factors in the *Separations Freeze Order*, and amended section 36.125 in light of the five-year freeze.[19] The new section 36.125 stated that carriers whose number of access lines increased above the thresholds set forth in the rule (10,000, 20,000, or 50,000 lines) from July 1, 1997 through June 30, 2006 should use the DEM weighting factor corresponding with the higher number of lines for the five-year planned duration of the freeze period (which, at that time, was from July 1, 2001 until June 30, 2006). The rule reads as follows:

> If during the period from January 1, 1997, through June 30, 2006, the number of a study area's access lines increased or will increase such that, under § 36.125(f) the weighting factor would be reduced, that lower weighting factor shall be applied to the study area's 1996 unweighted interstate DEM factor to derive a new local switching support factor. The study area will restate its Category 3, Local Switching Equipment factor under § 36.125(f) and use that factor for the duration of the freeze period.[20]

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18 *See Trends in Telephone Service*, prepared by Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, at 7-3, Table 7.1, "Total U.S. Wireline Telephone Lines" (August 2008), *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf>. The loss of second lines and the growth of wireless telephony were the primary contributors to the industry-wide reduction in access lines. These factors affected small rural LECs as well.

19 *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd 11382, ¶ 2 (2001) ("*2001 Separations Freeze Order*"); 47 C.F.R.§ 36.125(j).

20 47 C.F.R. § 36.125(j).

By its terms, the rule fails to provide guidance for carriers whose number of access lines decreases below a threshold after June 30, 2006. When it adopted the rule, the Commission noted that "the interim freeze will be in effect for five years or until the Commission has completed comprehensive separations reform, whichever comes first."[21]

In 2006, the Commission extended the separations freeze until June 30, 2009,[22] but did not revise sections 54.301 or 36.125. The *2006 Separations Extension Order* did not discuss LSS eligibility nor did it express any intention to permanently reduce the level of universal service support available to small rural LECs. Because the Commission did not revise section 36.125 when it extended the separations freeze, the rule is ambiguous as to what happens after June 30, 2006.

Following the specific reference to June 30, 2006, the last sentence of subsection 36.125(j) directs companies to use the lower weighting factor "for the duration of the freeze period." The Commission's rules do not define the term "freeze period," and the context of the provision with its specific reference to June 30, 2006 clearly suggests that the FCC at the time contemplated that the treatment of DEM weighting mandated by subsection 36.125 would expire on June 30, 2006. Thus, the rule contains an ambiguity as to what is meant by the term "freeze period" and whether an inequitable one-way treatment should continue past June 30, 2006.

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21 *2001 Separations Freeze Order* ¶ 2.

22 *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, ¶ 16 (2006) ("*2006 Separations Extension Order*").

IV. BEST READING OF THE AMBIGUOUS RULE

An interpretation of the *2006 Separations Freeze Order* to extend the one-way treatment in section 36.125(j) until 2009 would produce results inconsistent with public policy objectives and cause similarly situated carriers to receive markedly different levels of support. Such an interpretation would reduce or deny LSS to otherwise eligible carriers simply because the carriers were unfortunate enough to exceed a threshold and then reverse course and drop below the threshold in this short window of time. It would produce a manifestly unfair result directly at odds with the original rationale for providing LSS to small rural LECs, in furtherance of the statutory mandate. If LSS were reduced or denied in this manner, these carriers would endure considerable long term hardship because they would have a cost and revenue structure of a company below the threshold, but would not receive the switching cost support that the Commission previously had concluded was reasonable and appropriate for carriers of their size.

The Commission and the Joint Board both have recognized that, compared to the large non-rural carriers, "rural carriers generally serve fewer subscribers, serve more sparsely populated areas, and do not generally benefit [as much] from economies of scale and scope."[23] There continues to be a significant relative difference between the cost structures of carriers below the various access line thresholds and those of carriers above the thresholds. Moreover, the fact that a rural carrier had a greater number of lines in the past does not affect the carrier's current cost structure or economies of scale: there is no material difference between the cost structure of a carrier that has remained below a

[23] *1997 USF R&O* ¶ 291.

threshold number and that of a carrier of the same size that temporarily exceeded that access line threshold and then fell below the threshold again.

Without the appropriate amount of support, many of these small rural LECs are finding it increasingly difficult to make necessary network upgrades, to implement the redundancy needed for natural disasters and other emergencies, and to continue providing quality services at affordable rates. Therefore, by reducing eligibility for LSS simply because lines increased and then decreased, this reading would not serve the goals of the Universal Service Fund and would result in inequitable treatment of a certain group of carriers, including the Equity Coalition.

In addition, treating the last sentence of section 36.125(j) as if it continued to apply would condition a particular level of LSS support on the year in which the carrier's lines fell below a certain threshold level. A company whose lines increased above 50,000 after June 30, 2006 and then decreased again below 50,000 would be eligible for LSS. By contrast, companies that exceeded the 50,000 line threshold between 1997 and 2006 would not become eligible again for LSS (at least not as long as a separations freeze remains in place), even if their lines decreased again below the 50,000 level.

Such a reading of the rule would be arbitrary and inequitable because it would treat similarly situated companies differently. Some rural LECs would receive LSS in accordance with the weighting factor corresponding to their present number of access lines, while other rural LECs with the same number of lines, such as the Equity Coalition, would be denied the same level of support.[24] When a more rational and equitable interpretation of an ambiguous rule is available, it does not make sense to interpret the

[24] *See* "Comparison of Access Lines and DEM Support Factors," attached hereto as Exhibit 1.

rule to require USAC to provide LSS to one small rural company with 45,000 lines, but deny it to a second company with the same number of lines. The end result of this application would be contrary to the universal service principles established by Congress in Section 254(b) and articulated by the Commission in the *1997 USF Report and Order*, and would place a hardship on the second company and its customers.

The interpretation advanced by the Equity Coalition would read the term "freeze period" as referring to the June 30, 2006 date that is specifically referenced in the preceding sentence of the rule. Given the specific date reference in the rule, it appears that the original rule contemplated that the one-way DEM weighting treatment would expire on June 30, 2006. Given the absence of any specific language addressing, discussing, or even referencing subsection 36.125 in the *2006 Separations Freeze Order*, it is logical to read the rule as terminating the one-way treatment suggested by the rule as of June 30, 2006.

Therefore, the Petitioners urge the Commission to clarify that section 36.125(j) means that, after June 30, 2006, a small rural carrier is eligible for LSS at the level dictated by its current number of access lines, regardless of whether the access line levels temporarily exceeded thresholds in years past. Any other interpretation of section 36.125(j) would, without any reasonable justification, result in significant loss of LSS for those small rural LECs that rely on this support to upgrade their networks and to continue to provide quality services to their customers at reasonable rates, and whose cost structures are not different in any relevant way from other small rural LECs that have a similar number of access lines but are receiving full support.

V. ALTERNATIVE MEANS OF REDRESSING INEQUITIES

Alternatively, if the Commission declines to clarify the rules as requested herein, it should nevertheless reestablish an equitable distribution of LSS on a prospective basis by modifying its rules so as to eliminate the inequitable one-way treatment of changes in the number of access lines for small rural LECs. To accomplish this change, the Commission should revise section 36.125(j) to read:

> If after January 1, 1997, the number of a study area's access lines increases or decreases such that, under § 36.125(f) the weighting factor would change, the weighting factor appropriate to the current access line count shall be applied to the study area's 1996 unweighted interstate DEM factor to derive a new local switching support factor. The study area will restate its Category 3, Local Switching Equipment factor under § 36.125(f) accordingly.

The Commission should also revise section 54.301(a) to read:

> Beginning January 1, 1998, eligible rural telephone company study areas with 50,000 or fewer access lines shall receive support for local switching costs, defined as Category 3 local switching costs under the current Part 36 rules, using the following formula: the carrier's annual unseparated local switching revenue requirement shall be multiplied by the local switching support factor. The local switching support factor shall be defined as the difference between the 1996 weighted interstate DEM factor, calculated pursuant to § 36.125(f) of this chapter, and the 1996 unweighted interstate DEM factor. If the number of a study area's access lines increases or decreases such that, under current rule § 36.125(f), the weighted interstate DEM factor for 1997 or any successive year would change, the weighted interstate DEM factor appropriate to the carrier's current access line count shall be applied to the carrier's 1996 unweighted interstate DEM factor to derive a new local switching support factor.

VI. CONCLUSION

For the foregoing reasons, the FCC should take prompt action to clarify that, after June 30, 2006, sections 36.125 and 54.301 of the FCC's rules permit small incumbent LECs to receive support for local switching costs through LSS based upon their current number of access lines, regardless of whether the carrier's lines exceeded a threshold number in the past.

Respectfully submitted,

COALITION FOR EQUITY IN SWITCHING SUPPORT

/s/ V. David Miller II
V. David Miller II
Managing Member
Cross Telephone Company
P.O. Box 9
704 Third Avenue
Warner, OK 74469

/s/ Randy Daniel
Randy Daniel
Vice President of Finance
Hart Telephone Company
196 North Forest Avenue
P.O. Box 388
Hartwell, GA 30643

/s/ Debi Nobles
Debi Nobles
Vice President of Regulatory Affairs
Northeast Florida Telephone Company
130 North Fourth Street
Macclenny, FL 32063

/s/ David H. Armistead
David H. Armistead
Vice President and General Counsel
Hargray Telephone Company, Inc.
856 William Hilton Parkway, Building C
P.O. Box 5986
Hilton Head, SC 29938

/s/ Van G. Abbott
Van G. Abbott
KPU Telecommunications Division Manager
Ketchikan Public Utilities
2930 Tongass Avenue
Ketchikan, AK 99901

/s/ Steve A. Cox
Steve A. Cox
General Manager
Randolph Telephone Membership Corporation
3733 Old Cox Road
Asheboro, NC 27205

/s/ Lyman M. Horne
Lyman M. Horne
Executive Vice President and General Manager
Star Telephone Membership Corporation
3900 North U.S. 421 Highway
Clinton, NC 28329

Dated: January 8, 2009

Exhibit 1

Comparison of Access Lines and DEM Support Factors

ST	SAC	Study Area Name	2008 Working Loops	Weighting Factor
NM	491193	WINDSTREAM SW-NM#2	43,993	2.0
SC	**240523**	**HARGRAY TELEPHONE CO., INC. ***	**43,439**	**1.0**
NC	230468	ATLANTIC MEMBERSHIP	42,813	2.0
TX	442072	CONSOLIDATED FT BEND	42,252	2.0
TX	442083	GUADALUPE VALLEY TEL	42,135	2.0
NM	491164	WINDSTREAM SW-NM#1	40,698	2.0
NY	**150109**	**WINDSTREAM-JAMESTOWN**	**37,603**	**1.0**
NY	150106	WINDSTREAM NY-FULTON	35,047	2.0
IL	**341026**	**HARRISONVILLE TEL CO**	**19,856**	**2.0**
VT	**140069**	**WAITSFIELD/FAYSTON ***	**19,837**	**2.0**
MT	**482255**	**3-RIVERS TEL COOP**	**19,851**	**2.0**
TN	**290562**	**DEKALB TEL COOP**	**19,689**	**2.0**
TN	**290559**	**CONCORD TEL EXCHANGE**	**19,230**	**2.0**
WI	330950	CENTURYTEL-NW WI	18,718	2.5
MN	361479	SCOTT RICE -INTEGRA	18,526	2.5
NY	**150110**	**OGDEN TEL DBA FRNTER**	**18,170**	**2.0**
ME	**100025**	**STANDISH TEL CO**	**18,113**	**2.0**
WY	512251	RANGE TEL COOP - WY	17,941	2.5
LA	**270423**	**CENTURYTEL-CENTR LA**	**17,862**	**2.0**
OK	**431984**	**OKLAHOMA COMM SYSTEM**	**17,704**	**2.0**
AR	**401143**	**CENTURYTEL NW-AR-SIL**	**17,547**	**2.0**
OK	432011	OKLAHOMA WINDSTREAM	17,424	2.5
MN	361482	SHERBURNE CTY RURAL	17,390	2.5
NC	**230502**	**STAR MEMBERSHIP CORP ***	**17,346**	**2.0**
TN	290581	UTC OF TN	17,240	2.5
MN	361385	EAST OTTER TAIL TEL	17,135	2.5
AR	401705	CENTURYTEL- ARKANSAS	16,930	2.5
TX	442086	HILL COUNTRY CO-OP	16,852	2.5
ND	381447	NORTH DAKOTA TEL CO	16,751	2.5
SC	240516	CHESTER TEL CO - SC	16,528	2.5
OK	**432016**	**PANHANDLE TEL COOP**	**16,503**	**2.0**
KY	260421	WEST KENTUCKY RURAL	16,471	2.5
NY	**150128**	**FRONTIER-SYLVAN LAKE**	**15,680**	**2.0**

Sources: Projections from USAC's 4th Quarter 2008 FCC Filing - Appendix HC08
* Actual 2008 year end working loops for Coalition members

Comparison of Access Lines and DEM Support Factors

ST	SAC	Study Area Name	2008 Working Loops	Weighting Factor
MN	**361373**	**CONSOLIDATED TEL CO**	**9,940**	**2.5**
KS	**411826**	**RURAL TEL SERVICE CO**	**9,891**	**2.5**
TN	**290280**	**ARDMORE TEL CO**	**9,881**	**2.5**
CA	542332	THE PONDEROSA TEL CO	9,657	3.0
VA	**190249**	**ROANOKE & BOTETOURT ***	**9,620**	**2.5**
NH	**120045**	**KEARSARGE TEL CO**	**9,593**	**2.5**
NC	**230496**	**RANDOLPH MEMBERSHIP ***	**9,487**	**2.5**
TN	290578	TELLICO TEL CO	9,437	3.0
NY	**150091**	**DUNKIRK & FREDONIA**	**9,329**	**2.5**
GA	**220368**	**HART TEL CO**	**9,243**	**2.5**
OK	**431985**	**CROSS TEL CO ***	**9,178**	**2.5**
KY	260411	LESLIE COUNTY TEL CO	9,090	3.0
WI	**330944**	**FRONTIER-ST.CROIX**	**9,068**	**2.5**
MT	483308	BLACKFOOT TEL - CFT	8,983	3.0
MN	**361375**	**MID-COMM-HICKORYTECH**	**8,965**	**2.5**
FL	**210335**	**NORTHEAST FLORIDA TEL ***	**8,965**	**2.5**
NH	**120039**	**GRANITE STATE TEL ***	**8,960**	**2.5**
WI	**330934**	**CENTURYTEL-MW-WI**	**8,904**	**2.5**
ME	**100022**	**SACO RIVER TEL & TEL**	**8,888**	**2.5**
LA	**270431**	**CENTURYTEL-NW LA**	**8,846**	**2.5**
OK	**431969**	**BIXBY TEL CO ***	**8,834**	**2.5**
WI	330938	NORTHEAST TEL CO	8,804	3.0
OR	**532371**	**CASCADE UTIL INC**	**8,797**	**2.5**
WI	**330860**	**CHEQUAMEGON COM COOP**	**8,791**	**2.5**
TN	290557	CENTURY-CLAIBORNE	8,775	3.0
KY	260415	PEOPLES RURAL COOP	8,605	3.0
NY	**150122**	**FRONTIER-SENECA GORH**	**8,578**	**2.5**
WI	330909	MIDWAY TEL CO	8,558	3.0
NY	150089	DEPOSIT TEL CO	8,550	3.0
OK	432006	MCLOUD TEL CO	8,545	3.0
MN	361362	BRIDGEWATER TEL CO	8,467	3.0
MS	280454	FRANKLIN TEL CO - MS	8,413	3.0

Sources: Projections from USAC's 4th Quarter 2008 FCC Filing - Appendix HC08
* Actual 2008 year end working loops for Coalition members

Comparison of Access Lines and DEM Support Factors

ST	SAC	Study Area Name	2008 Working Loops	Weighting Factor
MI	**310738**	**WOLVERINE TEL CO**	**8,355**	**2.5**
AR	401692	ARKANSAS TEL CO	8,341	3.0
NM	494449	NAVAJO-NM-FRONTIER	8,329	3.0
ND	381630	POLAR COMM MUT AID	8,313	3.0
OK	431980	CHICKASAW TEL CO	8,294	3.0
NJ	**160135**	**WARWICK VALLEY-NJ**	**8,176**	**2.5**
IN	320775	HANCOCK TELECOM	8,174	3.0
AL	**250284**	**BUTLER TEL CO**	**8,171**	**2.5**
MT	482235	BLACKFOOT TEL - BTC	8,084	3.0
OH	**300659**	**TELEPHONE SERVICE ***	**8,001**	**2.5**
AK	**613013**	**KETCHIKAN PUBLIC UT ***	**7,628**	**2.5**

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